FENWICK ELLIOTT

The construction & energy law specialists

Issue 90 - March 2021

Insight

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Defending an adjudication: Things to think about

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Defending an adjudication: Things to think about[1]

The Referring Party to an adjudication has, in theory at least, ample time to prepare their case before they serve their Notice of Adjudication and then their Referral Notice. In contrast, the Respondent often has very little time to respond to the Referral Notice. Typically, most adjudicators will allow the Respondent 14 days to produce a Response, but sometimes that period can be as little as 7 days. As such the time pressure, particularly for high value claims, can be very intense. Organisation, and prioritisation, are therefore key.

In this *Insight* we look at the practical and legal considerations a Respondent may want to consider – both before, and after, the initial Notice of Adjudication is served on them – in order to produce the best Response in the available time and achieve the best result.

Preparation?

In order for an Adjudication to be validly commenced there must be a dispute that is capable of being referred pursuant to section 108 of the Housing Grants, Construction and Regeneration Act 1996 (the "**Act**"). Broadly speaking, the claim being referred must have been put to the Respondent and they must have had a reasonable time to consider it, even if they made the decision to remain silent rather than respond.[2] Key expert evidence should also be provided in advance to avoid jurisdictional challenges, even if only shortly before commencement.[3] As such, in reality, the Respondent should have had at least some time to start preparing for the inevitable.

Common warning signs of the inevitable include (but are by no means limited to): letters providing a limited period to reply; references to "*crystallisation*" or "*deeming a dispute to have arisen*"; ominous silence following a Payment Certificate or Pay Less Notice; or a distinct change in letter writing tone (i.e. a change in author). However, all too often these signs are ignored or the "*ostrich*" approach is adopted.

Instead, the potential Respondent should be using that time to get their ship in order. Experts (if required) should be instructed, or at the very least lined up, in case they are required. The project team should also start anticipating what evidence needs to be collated to support the Respondent's position. If there are high value variations, for example, the project team should compile the supporting information evidencing why they are not variations and/or why the value claimed by the potential Referring Party is not correct. Further, key witnesses should be located and instructed to start work setting out their recollection of events (and digging out the relevant documents).

At the same time, commercial discussions should be continued, if only to allow the Respondent to better understand the Referring Party's case. Adjudications can be expensive and silence (and/or the ostrich approach) typically results in adjudications happening sooner rather than later. Either way, engaging in commercial discussions will keep the door open to settlement, help maintain commercial relationships which can be further strained by adjudications and, if all else fails, buy the Respondent more time to prepare its defence.

Things to check for!

There are a number of basic things a Respondent needs to check for the minute the Notice of Adjudication and/or the Referral Notice lands. The starting point is whether the Adjudicator has jurisdiction. Issues to consider include: whether a dispute has crystallised; whether two disputes have been referred to adjudication; whether the Adjudicator has been properly appointed under the correct rules and/or by the correct Nominating Body; whether there is a right to adjudicate (is there a construction contract?); whether there is a contract at all between the parties; and whether the subject matter of the contract is exempt from the statutory provisions for adjudication, along with numerous others.[4]

With Easter approaching, one case to have in mind is *Beck Interiors Ltd v UK Flooring Contractors Limited*.[5] In that case a new head of claim to a dispute was included in a letter of claim sent after close of business before the Easter weekend. The adjudication was then commenced the Tuesday after the Easter weekend. When asked to enforce the decision, Akenhead J in the TCC concluded that there was insufficient time for the dispute regarding that issue to have crystallised. That aspect of the decision was therefore severed and not enforced.

If you consider that the Adjudicator has not been appointed properly or does not have jurisdiction for another reason, then that point needs to be made clearly (and politely) as soon as possible. If the Adjudicator makes the decision to continue anyway (and they often do), then the Respondent needs to reserve their rights and continue to do so throughout the process that follows.

Timescales

The timescale for producing a Response is generally between 7 and 14 days from the date of the Referral Notice. The NEC Form helpfully provides a Respondent with 14 days to respond[6] and, in all but the simplest of

cases, 14 days is generally allowed by adjudicators for the production of the Response.[7]

There are occasions, however, when it is worth a Respondent raising the issue of natural justice if the sheer quantity of the material landing on them in the Referral means that producing a Response within the 14-day period granted will be particularly difficult. The case law on the referral of very large final accounts makes it plain that the mere fact there is a large or complex dispute does not mean it cannot be dealt with by adjudication. The key is whether the adjudicator sufficiently appreciated the nature of any issue referred to him before reaching his decision and was satisfied he could do broad justice between the parties.

As underlined in *Bovis Lend Lease Ltd v Trustees of the London Clinic*,[8] the courts will perhaps expect an adjudicator to decline to accept an appointment where justice could not be done due to time limits not being extended, especially where an ambush has been launched at, for example, Christmas time. However, they also suggest that in practical terms most adjudicators would accept the appointment on the condition an extension of time was granted.[9] Certainly the most experienced and pragmatic adjudicators will, in our experience, guide the parties to agreeing a sensible timetable for complex and time-consuming final account claims where possible to do so. Equally, for a Referring Party to insist on too short a time period for the Response can often backfire when it comes to determining the time periods for their later submissions.

So what defences are open to the Respondent?

The general rule is that a Respondent can raise any defence, including those not raised previously, and that the Adjudicator will have jurisdiction to consider that defence.[10]

This general rule is subject to a number of key exceptions including the following:

1. **A valid Payment Certificate and/or Pay Less Notice must have been raised where the Respondent is seeking to open up the underlying interim account.**

   A party cannot get around the requirement to serve a Payment Certificate and/or Pay less Notice pursuant to the Act by arguing its case for a valuation it never made or a set-off it did not notify properly in an adjudication. If there has been no effective Payment Certificate and/or Pay Less Notice, then a smash and grab should succeed without the Adjudicator needing to look into the underlying issues in the account.[11]

2. **The defence must be relevant to the dispute referred.**

   If the Referring Party has only referred a specific part of an account to adjudication it will not be open to the Respondent to bring an entirely different section of the account into the equation unless, of course, it is relevant to whether a payment is due.[12]

The recent case of *Global Switch Estates 1 Limited v Sudlows Limited*[13] provides a useful summary of the rules on what defences are permissible, as set out in full below:

> *"i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it,* **the referring party is entitled to confine the dispute referred to specific parts of a wider dispute**, *such as the valuation of particular elements of work forming part of an application for interim payment.*
>
> *ii) A* **responding party is not entitled to widen the scope of the adjudication by adding further disputes** *arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.*
>
> *iii) A* **responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party**. *By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.*
>
> *iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works,* **it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.**
>
> *v) However, where the referring party seeks payment in respect of specific elements of the works, the* **responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.**
>
> *vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.*
>
> *vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.*
>
> *viii) If* **the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.**

> *ix) Not every failure to consider relevant points will amount to a breach of natural justice.* **The breach must be material and a finding of breach will only be made in plain and obvious cases.**
>
> *x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."* [Emphasis added]

These rules must be borne in mind by a Respondent when it comes to scoping out what they want to include in their Response. The rules can, admittedly, be frustrating where the Referral has been crafted to deliberately focus on the stronger claims within the Referring Party's account. However, if the Adjudicator wrongfully disallows a material defence (as they did in *Global Switch*) then that is a breach of natural justice and the decision will not be enforced.

A Respondent should also think very carefully before holding back any of their available defences (assuming they are good ones) for a later day. An Adjudicator's decision on a dispute will (assuming it is enforceable) be temporarily binding on the Parties unless or until Court or Arbitration proceedings (as applicable) overrule that decision.

Structuring the Response

The Response is the Respondent's first and main opportunity to set out its case in writing. It therefore needs to try to wrestle the agenda for the Adjudication back from the Referring Party. A line-by-line response may not then be the best way forward. Instead, if there are any general principles that can be identified they should be addressed, and key points focused on rather than allowing those points to get lost in the detail.

The key conclusions from any expert reports need to be weaved into the front-end document (often tricky in a tight timetable), and any key witness evidence highlighted. Depending on how the Referral was structured (and its contents), focused narratives may need to be produced that respond to any variation claims. A Response that makes life easy for an Adjudicator to understand the defence is key. They have not lived the project as both the parties have. Setting out the position in a clear and easy to understand document is therefore vital, as the Adjudicator will, after all, be under time pressure as well the parties. Equally, providing an easy-to-use spreadsheet to make any final calculations easier is also always a good idea.

Practicalities

So, with those objectives in mind, how does the Respondent's team achieve them? Well for Variations claims the 90/10 rule often applies. In other words, the Respondent needs to focus on where the money is. If there is an extension of time claim, then a delay expert (especially one who has had advance warning) can take away some of the burden but the facts will still need to be supported with evidence and ideally backed up by witness statements.

The reality is then that the Respondent's team (not just the external legal team) will need to be fully available for the period of the Response. If the team are still working on the project in question (or have moved on to another project) they will need to take time out from their day jobs to assist (particularly if the matter is high value). Their time will be required to provide witness statements, produce narrative responses for variations and dig out the backup documentation to support the Respondent's position. These tasks are all time consuming, and tight internal deadlines need to be set as soon as the Notice of Adjudication lands (and then confirmed when the Referral hits) and stuck to. That way the evidence can be deployed in the Response for maximum impact when it is finalised at the end of the 7- or 14-day time period allowed.

Consider being the Referring Party instead?

Finally, always keep open the possibility of commencing an adjudication yourself. If you are well prepared and want to wrestle control back from the other side, then that can sometimes be a very effective strategy.

Claire King
Fenwick Elliott
24 March 2021

Footnotes

1. By Claire King with thanks to Aurelia Grubyte for her research.
2. See *Amec Civil Engineering Ltd v Secretary of State for Transport* [2005] EWCA Civ 291.
3. See *MW High Tech Projects UK Ltd v Balfour Beatty Kilpatrick Ltd* [2020] EWHC 1413 (TCC)
4. See *Beck Interiors Ltd v UK Flooring Contractors* [2012] EWHC 1808 (TCC).
5. [2012] EWHC 1808 (TCC).
6. See Clause W2.3(2) in the NEC 3 form by way of example.
7. See *CIB v Birse Construction Limited* [2004] EWHC 2365 (TCC).
8. [2009] EWHC 64 (TCC).
9. See the very helpful discussion of the case law on parties arguing that the sheer quantity of material is not possible to deal with in the necessary timescales in *Coulson on Construction Adjudication*, Fourth Edition, sections 13-13 to 13-28.
10. See Julian Bailey, *Construction Law*, section 24.53. See also *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* [2055] EWHC 138 (TCC).
11. See *Letchworth Roofing Co v Sterling Building Co* [2009] EWHC 1119 (TCC).
12. Any defence must also arise under the same Construction Contract. An Adjudicator will not have scope to look at broader equitable set-offs that arise under other contracts or under insolvency legislation (if relevant).
13. [2020] EWHC 3314 (TCC) at paragraph 50.